

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

Gary Hofmann, et al.,

## Plaintiffs,

Case No.: 14-cv-02569-JM-JLB

V.

Fifth Generation, Inc., et al.,

## Defendants.

**AMENDED SCHEDULING ORDER  
REGULATING DISCOVERY  
AND OTHER PRE-TRIAL  
PROCEEDINGS**

The parties' Joint Motion to Amend Scheduling Order (ECF No. 39) is GRANTED

IN PART AND DENIED IN PART as reflected in the amended schedule set forth below.

Good cause appearing, **IT IS HEREBY ORDERED:**

1. The deadline for any motion to join other parties, to amend the pleadings, or

to file additional pleadings was July 17, 2015. Defendant's anticipated motion for

summary judgment on the safe harbor issue shall be filed on or before August 28, 2015.

Plaintiffs' class certification motion shall be filed on or before **November 20, 2015**.

Motions will not be heard or calendared unless counsel for the moving party has obtained

a motion hearing date from the law clerk of the judge who will hear the motion. The

period of time between the date you request a motion hearing date and the hearing date

may vary from one District Judge to another. Please plan accordingly. Failure of couns

to timely request a motion hearing date may result in the motion not being heard.

1       2. All discovery necessary for the anticipated motion by Defendant for  
2 summary judgment on the safe harbor issue shall be initiated by **June 26, 2015** and  
3 completed by all parties by **August 14, 2015**. All fact discovery shall be completed by  
4 all parties by **April 29, 2016**. “Completed” means that all discovery under Rules 30-36  
5 of the Federal Rules of Civil Procedure, and discovery subpoenas under Rule 45, must be  
6 initiated a sufficient period of time in advance of the cut-off date, **so that it may be**  
7 **completed** by the cut-off date, taking into account the times for service, notice and  
8 response as set forth in the Federal Rules of Civil Procedure. **Counsel shall promptly**  
9 **and in good faith meet and confer with regard to all discovery disputes in**  
10 **compliance with Local Rule 26.1(a)**. The Court expects counsel to make every effort to  
11 resolve all disputes without court intervention through the meet and confer process. If  
12 the parties reach an impasse on any discovery issue, counsel shall file an appropriate  
13 motion within the time limit and procedures outlined in the undersigned magistrate  
14 judge's chambers rules. **A failure to comply in this regard will result in a waiver of a**  
15 **party's discovery issue. Absent an order of the court, no stipulation continuing or**  
16 **altering this requirement will be recognized by the court.**

17       Discovery motions must be filed in the time and manner directed by Magistrate  
18 Judge Burkhardt (*see* Judge Burkhardt's Civil Chambers Rules on Discovery Disputes  
19 available on the Court's website). All discovery motions must be filed within 30 days of  
20 the service of an objection, answer, or response which becomes the subject of dispute, or

1 the passage of a discovery due date without response or production, and only after  
2 counsel have met and conferred to resolve the dispute and requested an informal  
3 teleconference with the Court.

4       3. The parties shall designate their respective experts in writing by **March 25,**  
5 **2016.** The parties must identify any person who may be used at trial to present evidence  
6 pursuant to Rules 702, 703 or 705 of the Fed. R. Evid. This requirement is not limited to  
7 retained experts. The date for exchange of rebuttal experts shall be by **April 29, 2016.**  
8 The written designations shall include the name, address and telephone number of the  
9 expert and a reasonable summary of the testimony the expert is expected to provide. The  
10 list shall also include the normal rates the expert charges for deposition and trial  
11 testimony.

12       4. By **March 25, 2016,** each party shall comply with the disclosure provisions  
13 in Rule 26(a)(2)(A) and (B) of the Federal Rules of Civil Procedure. This disclosure  
14 requirement applies to all persons retained or specially employed to provide expert  
15 testimony, or whose duties as an employee of the party regularly involve the giving of  
16 expert testimony. **Except as provided in the paragraph below, any party that fails to**  
17 **make these disclosures shall not, absent substantial justification, be permitted to use**  
18 **evidence or testimony not disclosed at any hearing or at the time of trial. In**  
19 **addition, the Court may impose sanctions as permitted by Fed. R. Civ. P. 37(c).**

1       5. Any party shall supplement its disclosure regarding contradictory or rebuttal  
2 evidence under Fed. R. Civ. P. 26(a)(2)(D) by April 29, 2016.

3       6. All expert discovery shall be completed by all parties by May 27, 2016. The  
4 parties shall comply with the same procedures set forth in the paragraph governing fact  
5 discovery.

6       7. Failure to comply with this section or any other discovery order of the court  
7 may result in the sanctions provided for in Fed. R. Civ. P. 37, including a prohibition on  
8 the introduction of experts or other designated matters in evidence.

9       8. All other pretrial motions must be filed by June 10, 2016. Counsel for the  
10 moving party must obtain a motion hearing date from the law clerk of the judge who will  
11 hear the motion. The period of time between the date you request a motion date and the  
12 hearing date may vary from one district judge to another. Please plan accordingly.  
13 Failure to make a timely request for a motion date may result in the motion not being  
14 heard. Motions in limine are to be filed as directed in the Local Rules, or as otherwise set  
15 by the district judge.

16       9. A Mandatory Settlement Conference shall be conducted on June 29, 2016 at  
17 9:00 AM in the chambers of Magistrate Judge **Jill L. Burkhardt**. Counsel or any party  
18 representing himself or herself shall submit confidential settlement briefs directly to  
19 chambers by June 17, 2016. All parties are ordered to read and to fully comply with the  
20 Chamber Rules of the assigned magistrate judge.

1       The **confidential** settlement statements should be lodged by e-mail to  
2 efile\_Burkhardt@casd.uscourts.gov. Each party's settlement statement shall concisely  
3 set forth the following: (1) the party's statement of the case; (2) the controlling legal  
4 issues; (3) issues of liability and damages; (4) the party's settlement position, including  
5 the last offer or demand made by that party; (5) a separate statement of the offer or  
6 demand the party is prepared to make at the settlement conference; and (6) a list of all  
7 attorney and non-attorney attendees for the Conference, including person(s) and their  
8 title(s) or position(s) with the party who will attend and have settlement authority at the  
9 conference. If exhibits are attached and the total submission amounts to more than 20  
10 pages, a hard copy must also be delivered directly to Magistrate Judge Burkhardt's  
11 chambers. **Settlement conference statements shall not be filed with the Clerk of the**  
12 **Court. Settlement conference statements may be exchanged confidentially with**  
13 **opposing counsel within the parties' discretion.**

14       Pursuant to Local Civil Rule 16.3, all party representatives and claims adjusters for  
15 insured defendants with full and unlimited authority<sup>1</sup> to negotiate and enter into a binding  
16 settlement, as well as the principal attorney(s) responsible for the litigation, must be  
17

18       <sup>1</sup> "Full authority to settle" means that the individuals at the settlement conference must be  
19 authorized to fully explore settlement options and to agree at that time to any settlement terms  
20 acceptable to the parties. *Heileman Brewing Co., Inc. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir.  
1989). The person needs to have "unfettered discretion and authority" to change the settlement position  
of a party. *Pitman v. Brinker Int'l., Inc.*, 216 F.R.D. 481, 485-86 (D. Ariz. 2003). The purpose of  
requiring a person with unlimited settlement authority to attend the conference includes that the person's  
view of the case may be altered during the face to face conference. *Id.* at 486. A limited or a sum  
certain of authority is not adequate. *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590 (8th Cir. 2001).

1 present and legally and factually prepared to discuss and resolve the case at the  
2 mandatory settlement conference. In the case of a corporate entity, an authorized  
3 representative of the corporation who is not retained outside counsel must be present and  
4 must have discretionary authority to commit the company to pay an amount up to the  
5 amount of the Plaintiffs' prayer (excluding punitive damages prayers). The purpose of  
6 this requirement is to have representatives present who can settle the case during the  
7 course of the conference without consulting a superior.

8 Failure to attend the conference or obtain proper excuse will be considered grounds  
9 for sanctions.

10 10. In jury trial cases before Judge Miller, neither party is required to file  
11 Memoranda of Contentions of Fact and Law.

12 11. Counsel shall comply with the pre-trial disclosure requirements of Fed. R.  
13 Civ. P. 26(a)(3) by September 2, 2016. Failure to comply with these disclosure  
14 requirements could result in evidence preclusion or other sanctions under Fed. R. Civ. P.  
15 37.

16 12. Counsel shall meet and take the action required by Local Rule 16.1(f)(4) by  
17 September 9, 2016. At this meeting, counsel shall discuss and attempt to enter into  
18 stipulations and agreements resulting in simplification of the triable issues. Counsel shall  
19 exchange copies and/or display all exhibits other than those to be used for impeachment.  
20 The exhibits shall be prepared in accordance with Local Rule 16.1(f)(4)(c). Counsel shall

1 note any objections they have to any other parties' Pretrial Disclosures under Fed. R. Civ.  
2 P. 26(a)(3). Counsel shall cooperate in the preparation of the proposed pretrial  
3 conference order.

4 13. Counsel for plaintiffs will be responsible for preparing the pretrial order and  
5 arranging the meetings of counsel pursuant to Civil Local Rule 16.1(f). By September  
6 16, 2016, plaintiffs' counsel must provide opposing counsel with the proposed pretrial  
7 order for review and approval. Opposing counsel must communicate promptly with  
8 plaintiffs' attorney concerning any objections to form or content of the pretrial order, and  
9 both parties shall attempt promptly to resolve their differences, if any, concerning the  
10 order.

11 14. The Proposed Final Pretrial Conference Order, including objections to any  
12 other parties' Fed. R. Civ. P. 26(a)(3) Pretrial Disclosures shall be prepared, served and  
13 lodged with the assigned district judge by September 23, 2016, and shall be in the form  
14 prescribed in and comply with Local Rule 16.1(f)(6).

15 15. The final Pretrial Conference is scheduled on the calendar of the **Honorable**  
16 **Jeffrey T. Miller** on September 30, 2016 at 8:30 AM. A trial will be held before the  
17 Honorable Jeffrey T. Miller, United States District Court Judge, on October 31, 2016 at  
18 10:00 AM.

19 16. The parties must review the chambers' rules for the assigned district judge  
20 and magistrate judge.

1       17. A post trial settlement conference before a magistrate judge may be held  
2 within 30 days of verdict in the case.

3       18. The dates and times set forth herein will not be modified except for good  
4 cause shown.

5       19. Briefs or memoranda in support of or in opposition to any pending motion  
6 shall not exceed twenty-five (25) pages in length without leave of a district court judge.  
7 No reply memorandum shall exceed ten (10) pages without leave of a district court judge.  
8 Briefs and memoranda exceeding ten (10) pages in length shall have a table of contents  
9 and a table of authorities cited.

10       20. Plaintiffs' counsel shall serve a copy of this order on all parties that enter  
11 this case hereafter. **IT IS SO ORDERED.**

12       Dated: July 23, 2015

  
Hon. Jill L. Burkhardt  
United States Magistrate Judge